Supreme Court, U.S.
FILED
MAR 31 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1408

BOARD OF EDUCATION OF THE CITY OF CHICAGO, A BODY POLITIC AND CORPORATE,

Petitioner.

vs.

VIVIAN B. KING, JOSEPHINE RIZZO, DOROTHY McDONALD AND VERBENA WHITAKER, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BARBARA J. HILLMAN,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorney for Respondents.

KLEIMAN, CORNFIELD AND FELDMAN,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Questions Presented	2
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	10
Appendix "A"	A1

CITATIONS.

Cases.

Alicea v. Puerto Rico Gas and Coke Co., 89 F. Supp. 938 (Puerto Rico, 1950)	6, 8
Burke v. Mesta Machine Co., 79 F. Supp. 588 (W. D. Penn., 1948)	8
Day & Zimmerman, Inc. v. Reid, 168 F. 2d 356 (C. A. 8, 1948)	8
Jackson v. Northwest Airlines, 76 F. Supp. 121 (D. C., 1948)	8
Life and Casualty Company of Tennessee v. McCray, 291 U. S. 566, 575 (1934)	9
Martinez v. Phillips Petroleum Company, 283 F. Supp. 514 (E. D. Idaho, 1968) affirmed 424 F. 2d 547 (C. A. 9, 1970)	6
Maryland v. Wirtz, 392 U. S. 183 (1968)	3
Mitchell v. Lublin, McGaughy & Associates, 358 U. S. 207 (1959)	10
Pollard v. Herbert J. Siegal Organization, Inc., 272 F. Supp. 821 (1967)	10

Reed v. Murphy, 232 F. 2d 668 (C. A. 5, 1956) 9

Skidmore v. Swift & Co., 322 U. S. 134 (1944) 4

Sparks v. Pederson Manufacturing Co., 9 WH Cases 156 (D. C. Conn., 1944) 6

Walling v. National Ice & Fuel Corp., 158 F. 2d 28 (C. A. 7, 1946) 10

Wirtz v. University Advertising Service, 258 F. Supp. 542 (1966) 10

Yogurt Master Inc. v. Goldberg, 310 F. 2d 53 (1962), cert. denied 372 U. S. 978 (1960) 10

Statutes and Interpretative Bulletins.

Fair Labor Standards Act, 29 U. S. C. § 201, et seq. 2, 3, 6, 7, 8, 9, 10

Portal to Portal Act, Section 10, 29 U. S. C. § 259 .....2, 3, 4, 5, 6

Portal to Portal Act, Section 11, 29 U. S. C. § 260 .....2, 4, 7, 8, 9

Portal Act Bulletin 6, 7, 10

Wage-Hour Administrator's Opinion Letter No. 656 .. 5

Wage-Hour Administrator's Opinion Letter No. 678 .. 5

Wage-Hour Administrator's Opinion Letter No. 708 .. 5

Wage-Hour Administrator's Opinion Letter No. 868 .. 5

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To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Respondents respectfully submit that the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this cause correctly stated the law as enunciated in prior decisions of this Court and other lower courts. The judgment and opinion are not in conflict with any decision of any other Court of Appeals and raise no important issue of federal law.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals was correct in holding that administrative bulletins which repeatedly stated that they did not constitute administrative rulings, and which were first discovered by the Petitioner after the filing of the suit and first invoked as a bar six months after the suit was instituted, in Petitioner's third amended answer, did not constitute a defense to any action for overtime wages under Section 10 of the Portal to Portal Act, 29 U. S. C. § 259, and thus did not relieve Petitioner from liability for paying such overtime?

2. Whether the Court of Appeals was correct in holding that Section 11 of the Portal to Portal Act, 29 U. S. C. § 260 does not render the Petitioner immune to liability for liquidated damages where the only reason for not paying overtime wages was the pendancy of a court suit seeking to recover such wages?

STATEMENT OF THE CASE.

The instant suit was filed on December 18, 1967 against the Board of Education of the City of Chicago by certain of its clerical employees. The action was brought under and in accordance with the 1966 amendments to the Fair Labor Standards Act and requested overtime payments and liquidated damages for all overtime worked since February 1, 1967.

Six months after the filing of this suit, on May 22, 1968, the Petitioner, in its third amended answer to the complaint, pleaded for the first time that it was immune from liability for both the overtime wages and liquidated damages by reason of the Portal to Portal Act. The basis of its defense were three administrative bulletins, the first

of which was issued ten months after Respondents became entitled to receive time-and-one-half for overtime. These bulletins upon which the Petitioner purportedly relied, each contained clear and concise language stating that the information given therein was advisory only and that no administrative rulings were being made through such communications. Further, the Petitioner did not even learn of the existence of these bulletins until, at the earliest, January 25, 1968, a year after the effective date of the 1966 amendments to the Fair Labor Standards Act and after the institution of the present law suit.

Shortly after the decision of this Court in *Maryland* v. *Wirtz,* 392 U. S. 183 (1968), the Wage-Hour Administrator, in accordance with the promises contained in his earlier letter, issued, on October 18, 1968, his first administrative ruling concerned the application of the 1966 amendments to the Fair Labor Standards Act to persons such as Respondents herein. He clearly ruled that they were covered by the Act. Petitioner never contested the meaning or validity of that ruling.

Both parties moved for summary judgment. The District Court denied overtime wages for all periods prior to October 18, 1968. The Judge also denied all liquidated damages even for the period after October 18, 1968 on the ground that the Petitioner was engaged in the instant litigation.

On appeal, the Court of Appeals reversed. In addition to ruling that the Petitioner had not in fact relied on the administrative bulletins it attempted to invoke, the Court of Appeals held that these bulletins were on their face only tentative, vague and ambiguous and hedged with numerous qualifications, and thus did not constitute administrative regulations, orders, rulings, approvals or interpretations within the meaning of Section 10 of the Portal to Portal Act.

The Court of Appeals also unanimously found that Respondents were entitled to liquidated damages for the period commencing October 18, 1968. The Court held that the Respondent had advanced no reasonable grounds for failing to pay overtime after that date and thus was not entitled to the protection of Section 11 of the Portal to Portal Act.

REASONS FOR DENYING THE WRIT.

1. The decision of the Court of Appeals in this case in no way effected the validity or breadth of the Portal to Portal Act. The legislative intent in enacting this statute argued by Petitioner on pages 10-11 of its Petition was never questioned by the Respondents. The only question raised by Respondents was whether there had in fact been an administrative ruling upon which Petitioner had relied.

The Court also did not pass upon the weight to be given to administrative rulings of the Wage-Hour Administrator. No party ever challenged any statement of the Wage-Hour Administrator and that issue, as determined by this Court in *Skidmore* v. *Swift & Co.*, 322 U. S. 134 (1944), was never even raised in the instant cause. Thus the cases cited by Petitioner, on pages 8 and 9 of its Petition, as well as the argument contained on pages 7-10 therein, are irrelevant to this matter.

Rather, the issue upon which the Court of Appeals based its opinion was whether the three bulletins, upon which the Petitioner allegedly relied, were in fact administrative regulations, orders, rulings, approvals or interpretations as required by Section 10 of the Portal to Portal Act. The Court of Appeals ruled that they were not. Its decision is in accord with previous decisions on this matter and constitutes a correct statement of the law.

Each of these letters contains an identical, forceful and clear disclaimer of any intent on the part of the Wage-Hour Administrator to issue a definite interpretation regarding the question whether persons, such as Respondents in the instant case, were covered by the Fair Labor Standards Act:

> "We regret the delay in replying to your inquiry, but, as you may know, the constitutionality of the application of the act to certain employees of States and political subdivisions has been challenged in the case of *Maryland, et al.* v. *Wirtz.* Though the three-judge District Court has rendered judgment in this suit, the matter has been appealed to the Supreme Court of the United States. We do not know to what extent, if any, the Supreme Court may consider questions of the scope of application of the terms of the statute in relation to the constitutionality of the provisions concerning public schools. Under these circumstances, it does not appear appropriate for us to issue interpretations of these provisions until after the Court has ruled on the fundamental constitutional issue." (Wage-Hour Administrator's Letter, Nos. 656, 678, 708.)

In order to make his position crystal clear, the Wage-Hour Administrator in his first letter on this subject underlined the fact that he was not issuing an authoritative or binding administrative regulation, order, ruling, approval or interpretation by stating, in the paragraph following the above quoted disclaimer, that "we are not in a position to give other than tentative opinions about the scope of these provisions . . ." (Wage-Hour Administrator's Letter, No. 656.)

These caveats remove any authoritative effect from the opinion letters cited by the Board. The inclusion of language in administrative letters, such as the language included in the letters specified above, renders such letters ineffectual in providing a defense under Section 10 of the

Portal to Portal Act. *Sparks* v. *Pederson Manufacturing Co.*, 9 WH Cases 156 (D. C. Conn., 1944); *Alicea* v. *Puerto Rico Gas and Coke Co.*, 89 F. Supp. 938 (Puerto Rico, 1950).

Martinez v. *Phillips Petroleum Company*, 283 F. Supp. 514 (E. D. Idaho, 1968) affirmed 424 F. 2d 547 (C. A. 9, 1970), the only case cited by Petitioner on this issue, in no way conflicts with the foregoing. In *Martinez*, the Wage-Hour Administrator wrote to the very employees who later brought suit, stating unequivocably and unconditionally that in accordance with interpretive rulings previously issued, they were not covered by the Fair Labor Standards Act. See 283 F. Supp. at 525-526.

In addition to the absence of any administrative ruling, the Court of Appeals also found that the Petitioner had not even relied upon the administrative bulletins it sought to invoke, as required by Section 10 of the Portal to Portal Act. The words "reliance on" as used in the Portal to Portal Act mean actual knowledge of the existence and terms of a written document, such as an administrative ruling, order, etc., which knowledge constitutes the basis for the action or inaction of the person allegedly doing the relying. *Portal Act Bulletin*, "In Reliance On" (Appendix A).

As the Court of Appeals found, it is clear that the Petitioner did not so act.

The first supposed administrative ruling on which Petitioner alleged it relied was written in September, 1967. Therefore, Petitioner could not and did not rely on any such ruling when it determined not to pay and did not pay Respondents overtime wages for the period from February, 1967 to September, 1967.

Further, as the Court of Appeals held, Petitioner did not learn of the existence of the bulletin upon which it

purportedly relied until after Respondents had filed suit. It first attempted to invoke the Portal to Portal Act bar in its third amended complaint, filed May 22, 1968, almost six months after this suit was filed. Its decision not to pay Respondents was not based on any so-called administrative ruling.

The defense relating to administrative rulings was an afterthought, something discovered by Petitioner in researching its defense to the instant suit. These alleged rulings were not known to Petitioner when it determined not to pay Respondents overtime wages and were not the reason or basis for that decision. The Petitioner has no defense under the Portal to Portal Act. *Portal Act Bulletin,* "In Reliance On" Sec. (b), Appendix A.

The decision of the Court of Appeals in determining Respondents eligibility for overtime pay is in accord with the applicable law, sustainable on two independent and alternate grounds, and not in conflict with any other court decision. The Petition for Writ of Certiorari should be denied.

2. The Court of Appeals determined that the Respondents were entitled to liquidated damages in an amount equal to their overtime wages, as provided in the Fair Labor Standards Act, for the period after October 18, 1968. It was October 18, 1968 that the Wage-Hour Administrator issued his ruling clearly holding that Respondents were covered by the 1966 amendments to the Fair Labor Standards Act. The District Court found Petitioner liable for overtime wages after this date.

Petitioner never contested this ruling. It gave no reason for not paying overtime wages to Respondents after October 18, 1968.

Section 11 of the Portal to Portal Act, 29 U. S. C. § 260, provides that an employer may be relieved of damages

where his failure to pay in accordance with the requirements of the Fair Labor Standards Act was in good faith and based on reasonable grounds for believing that he was not in violation of the law. Both elements of this statute must be pleaded and proven by the Petitioner. *Day & Zimmerman, Inc.* v. *Reid,* 168 F. 2d 356 (C. A. 8, 1948); *Burke* v. *Mesta Machine Co.,* 79 F. Supp. 588 (W. D. Penn., 1948).

Petitioner neither alleged or proved that it was entitled to any immunity for damages after October 18, 1968. Petitioner was obliged to show that it had some basis which it actually believed rendered it immune from overtime payments to Respondents. *Jackson* v. *Northwest Airlines,* 76 F. Supp. 121 (D. C., 1948); *Burke* v. *Mesta Machine Co.,* 79 F. Supp. 588 (W. D. Penn., 1948); *Alicea* v. *Puerto Rico Gas and Coke Co.,* 89 F. Supp. 938 (Puerto Rico, 1950). As the Court of Appeals found, the Petitioner had no such belief after October 18, 1968.

The only reason advanced by the District Court, and the only reason advanced by the Petitioner now, for denying liquidated damages after October 18, 1968, was the fact that Respondents had filed suit rather than to continue waiting for the Petitioner to pay them. The Court of Appeals correctly ruled that litigation, as a matter of law, does not confer immunity under Section 11 of the Portal to Portal Act.

To permit the defense of litigation to be used under the Portal to Portal Act as an escape to liability would surely constitute a travesty of justice. The purpose of the Portal to Portal Act was not to punish the innocent and reward the lawbreaker.

If litigation were to be a defense to liability, no employer would voluntarily pay minimum or overtime wages; he would force his employees to sue. Imagine the interest

he could earn in the interim. Then, like Petitioner here who was held liable for overtime pay after October 18, 1968, he would claim exemption from liquidated damages because such suit was filed. The legislative purpose in providing liquidated damages would be completely nullified. To permit litigation to serve as a defense would effectively repeal the liquidated damages section of the Fair Labor Standards Act. Liquidated damages are cognizable only upon suit; upon suit every employer would claim litigation immunity and thus, there would be no right of liquidated damages as provided by the Fair Labor Standards Act. Like any other defendant who is found to be violating a law, the Petitioner must pay for the damages occasioned by its continued violation during the period of litigation. *Life and Casualty Company of Tennessee* v. *McCray,* 291 U. S. 566, 575 (1934).

While Respondents do not challenge the discretionary power of a trial judge under Section 11 of the Portal to Portal Act, as argued by Petitioner at page 13 of its Petition, the very case cited by Petitioner conclusively demonstrates that this discretion is subject to review. *Reed* v. *Murphy,* 232 F. 2d 668 (C. A. 5, 1956).

Further, in the instant cause, unlike the case cited by Petitioner, there was no trial, either with or without a jury. It was tried on cross motions for summary judgment. All the evidence and arguments before the District Court were before the Court of Appeals.

The Court of Appeals' ruling was based on law, not fact, an issue clearly within its appellate jurisdiction. Its ruling was correct and not in conflict with any prior court rulings.

CONCLUSION.

The Fair Labor Standards Act is remedial legislation and is therefore to be broadly interpreted so as to effect its purpose. *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U. S. 207 (1959); *Walling* v. *National Ice & Fuel Corp.*, 158 F. 2d 28 (C. A. 7, 1946). Any inroads on its remedial effects, such as the Portal to Portal Act, are to be strictly construed. *Yogurt Master Inc.* v. *Goldberg*, 310 F. 2d 53 (1962), cert. denied 372 U. S. 978 (1960); *Wirtz* v. *University Advertising Service*, 258 F. Supp. 542 (1966); *Pollard* v. *Herbert J. Siegal Organization, Inc.*, 272 F. Supp. 821 (1967); and the *Portal Act Bulletin* (Appendix A). The Court of Appeals' judgment and opinion in this case follows these judicial precepts. It is in accord, not in conflict, with prior judicial decisions on these matters and is a correct statement of the law. For these reasons as well as the reasons contained in the body of this brief, the Respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

BARBARA J. HILLMAN,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorney for Respondents.

KLEIMAN, CORNFIELD AND FELDMAN,
Of Counsel.

APPENDIX "A".

1. PORTAL-TO-PORTAL BULLETIN.

IN RELIANCE ON:

(a) In addition to acting (or omitting to act) in good faith and in conformity with an administrative regulation, order, ruling, approval, interpretation, enforcement policy or practice, the employer must also prove that he actually relied upon it.[101]

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit had been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the Administrators' interpretation at the

101. In a colloquy between Senators Thye and Cooper (1947 Cong. Rec. 4577), Senator Cooper pointed out that the purpose of section 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the Act *"grew out of reliance upon"* the ruling of an agency. See also statement of Representative Keating, 1947 Cong. Rec. 1566; colloquy between Representatives Keating and Devitt, 1947 Cong. Rec. 1569, cf. colloquy between Senators Donnell and Ball, 1947 Cong. Rec. 4502. (Emphasis in original.)

time of his violations, his failure to comply with the overtime provisions could not have been "in reliance on" that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.